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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 49

NORMAN C. BERNHARDT,

Petitioner,

vs.

POLYGRAPHIC COMPANY OF AMERICA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the district court is reported in 122 Fed. Supp. 733 (R. 15). The opinion of the circuit court of appeals is reported in 218 Fed. 2d. 948 (R. 19).[1]

Jurisdiction

The mandate reversing the order of the district court with costs to the appellant was entered February 4, 1955. On March 11, 1955, on motion of the petitioner, the mandate was recalled by the circuit court and arbitration proceed-

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[1] The Court of Appeals decision is discussed in a note in 41 Virginia Law Review, at page 379.

ings were stayed pending petitioner's application to the Supreme Court for certiorari. The petition for a writ of certiorari was filed on April 16, 1955, and granted May 31, 1955.

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Whether or not Section 3 of the Federal Arbitration Act (Title 9, United States Code), which provides for a stay of the trial of an action pending arbitration, may be invoked to enforce arbitration of questions arising out of a contract of employment calling for performance solely within Vermont, a non-enforcing state, where the case has been removed from a Vermont state court to the federal district court solely upon the ground of diversity of citizenship of the parties.

2. Whether or not the doctrine of the case of *Erie R. R. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), required the federal court in this situation to apply local Vermont law which denies the enforceability of arbitration agreements.

Statutes Involved

United States Arbitration Act of February 12, 1925, C. 213, Secs. 1, 2, & 3, 43 Stat. 833 as amended by United States Arbitration Act of July 30, 1947, C. 392, Sec. 1, 61 Stat. 669, 9 U. S. C. Secs. 1-3:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> "'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or

any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement of the Case

The case at bar involves the breach of a contract of employment dated July 19, 1952, whereby the respondent engaged the petitioner to be superintendent at its plant in North Bennington, Vermont, for a term of three years and subsequently discharged him, without cause, as he claims, on October 22, 1953, when the contract had nearly two years to run.

The contract contained an arbitration clause which read as follows:

> "*Eleventh:* The parties hereto do agree that any difference, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them for arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successor, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere." (R. 7-8)

After his discharge, petitioner brought suit in Vermont, and the case was removed from the Bennington County Court to the United States District Court for the District of Vermont by respondent's petition alleging diversity of citizenship of the parties as the sole ground for jurisdiction of the federal court (R. 1).

After removal to the district court, the respondent sought by motion to have the legal proceedings stayed pending arbitration, relying on Section 3 of the Federal Arbitration Act (Title 9 of the United States Code) (R. 13).

The motion was denied by the District Court for the District of Vermont, which under the doctrine of *Erie R. R. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), applied the Vermont Law which denies enforceability of arbitration agreements (R. 15-17).

Respondent then appealed to the United States Circuit Court of Appeals for the Second Circuit where the District Court's decision was reversed and a mandate issued staying proceedings under the authority of Section 3 of the Federal Arbitration Act (9 U. S. Code, Sec. 3), the circuit court holding that this case does not fall within the doctrine of *Erie* v. *Tompkins, supra*; (R. 19-25).

On motion of the petitioner the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari (original record page 53; omitted from printed record).

Specifications of Error

The Court of Appeals erred:

1. In holding that the stay involved in this cause of action is not "substantive" within the meaning of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *York*, 326 U. S. p. 99, 89 L. Ed. 2079 (1945).

2. In holding that the provisions of Section 3 of the Federal Arbitration Act are not limited to arbitration agreements in contracts of the kind covered by Section 2 of the Act.

3. In misconstruing the Appellee's position as to the inapplicability of the Act to this arbitration contract.

4. In refusing to apply Vermont Law and Vermont Policy in deciding the question of whether or not an unwilling party will be forced to arbitrate matters arising out of the breach of a contract which was by its terms to be per-

formed wholly in Vermont, in an action removed from the Vermont court solely on the ground of diversity of citizenship of the parties.

ARGUMENT

I. Under Vermont law, as under the common law generally, arbitration agreements are unenforceable.

> "It is true that mutual promises of submission to arbitration offered sufficient consideration to bind the parties. . . . But either party may revoke the submission at any time before the publication of an award * * *. A revoked submission is no bar to a suit for damages on the claim submitted * * *. It follows that when a suit is brought the rights of the parties are to be determined by the rules applicable to that proceeding, regardless of what may have been done under the submission."
>
> *Mead's Administratrix* v. *Owen*, 83 Vt. 132, 135 (1910).

See also

Sartwell v. *Sowles*, 72 Vt. 270 (1900);
Welch v. *Miller*, 70 Vt. 108 (1897);
Marsh v. *Packer*, 20 Vt. 198 (1848);
Aspinwall v. *Tousey*, 2 Tyler 328 (1803);
Hathaway v. *Strong, Porter & Co.*, 2 Tyler 105 (1802).

This accords with the common law as enforced generally, including the common law of New York prior to the passage of its arbitration statute.[2]

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[2] Some jurisdictions, notable among them New York and Pennsylvania, have deemed it expedient in resolving congestion in their courts to adopt legislation making arbitration agreements enforceable. But earlier, when Pennsylvania had such legislation and New York did not, the New York Court of Appeals refused to apply Pennsylvania law to a contract providing for performance wholly

(Footnote continued on next page)

6 *Williston on Contracts*, 5360 Section 1919 (Revised Edition);
Restatement of Contracts, Section 550, *Bargain for Arbitration;*
Meachem v. *Jamestown, etc.*, New York 211 N. Y. 346 (1914).

None of the Vermont cases deals with agreements to arbitrate future disputes. But the argument applies with double force to such executory agreements, for although contracts to submit existing disputes, are unenforceable, they are valid to the extent that their breach gives rise to a cause of action for nominal damages, whereas the common

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in Pennsylvania, holding in *Meachem* v. *Jamestown, etc. Ry.*, 211 New York 346 (1914) with an able concurring opinion by Judge Cardozo, that because arbitration is a matter of remedy the law of the State of the forum governs its enforceability. This rule of law has been universally followed since, and it should be followed here where Vermont with its sparse population and uncrowded court dockets has no such legislation but follows the common law rule that arbitration agreements, especially agreements to arbitrate future disputes, are not enforceable against a party to the agreement who chooses to litigate rather than arbitrate.

In Beale's treatise on *The Conflict of Laws* (1935 Ed.) he states in Section 347.5, pages 1245-6 "Enforcement of Arbitration Agreements", that "American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the forum determines their enforceability regardless of the place where the contract containing an arbitration provision was made, or was to be performed, or the law intended by the parties to govern" (citing many authorities)

and further (at page 1247) that

"If the arbitration agreement provides *specifically* that the arbitration is to be held in a state other than the forum, *lex fori* governs nevertheless. Thus, if the arbitration provided for is to be held in an enforcing state and the forum is a non-enforcing one, the arbitration provision will nonetheless be disregarded." citing *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915); *The Eros*, 241 Fed. 186 (S. D. N. Y. 1916), aff'd 251 Fed. 45 (CCA 2, 1918). See also *Shaeffer* v. *Metro Goldwyn Mayer*, 36 Oh. App. 31, 172 N. E. 689 (1930).

law declares that agreements to arbitrate future disputes are completely invalid.

3 American Jurisprudence 854, 855, Arbitration and Award, Section 27.

Petitioner's position in regard to the Vermont law has been conceded by the respondent both in the circuit court and in the district court below.

II. The accident of a suit by a non-resident litigant in a Federal Court instead of in a State Court should not lead to a substantially different result.

A. The rule of the cases of *Erie R. R. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), and *Guaranty Trust Company* v. *York*, 326 U. S. 99, 109, 89 L. Ed. 2079, 2086 (1945) is well stated the latter case to be that "in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The rub of the policy that underlies *Erie R. R. Co.* v. *Tompkins*, is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State Court a block away should not lead to a substantially different result."

This appears to be a clear and direct statement of what is now meant by the principle of uniformity of decision.

This Court in *Erie* v. *Tompkins (supra)* held that judicial decisions are laws of the states within the meaning of the Rules of Decision Act.[3]

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[3] ". . . the purpose of (sec. 34 of the Judiciary Act) was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship case would apply as their rules of decision the law of the State, unwritten as well as written." *Erie Railroad Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 72, 73; 82 L. Ed. 1188, 1191.)

Ever since that decision, which overruled *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), the Federal Courts have held as a matter of law that where no federal question was involved, and the parties were before a Federal Court solely because of the diversity of citizenship of the parties, the Federal District Court was bound to apply the law of the State within whose boundaries it sat, whether such local law was statutory or common law.

Thus in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, pp. 191, 192 (1947) it was held that

> "The essence of diversity jurisdiction is that a federal court enforces State law and State policy * * *. A federal court of North Carolina, when invoked on grounds of diversity of citizenship, cannot give what North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

As a result the cases following it have established the rule that "in diversity cases the federal court administers the state system of law in all except details relating to its own conduct of business." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555, 93 L. Ed. 1528, 1541 (1949).

In *Guaranty Trust Co.* v. *York (supra)*, this court, per Mr. Justice Frankfurter, in discussing the theory behind the *Erie* v. *Tompkins* rule, held (at pages 108, 109, 111 and 112) that:

> "When, because the plaintiff happens to be a nonresident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary, because the two judicial systems are not identic: But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, *it cannot afford recovery if the right to recover is made unavailable*

by the State nor can it substantially affect the enforcement of the right as given by the State * * * (pages 108-109) (emphasis added).

" . . . Erie R. R. Co. *v.* Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. R. Co. *v.* Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. * * * (page 109)

"Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. * * * And so Congress affordled out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." (pages 111 and 112)

B. The salutary doctrine of *Erie* v. *Tompkins* has no connection as such with the common law concepts of "substance" and "procedure"; and the very use of the word "substantive" by the Circuit Court in the principal case was error.

In *Guaranty Trust Co.* v. *York (supra)* this court specifically held that since the question is whether it significantly affects the result of a litigation for a Federal Court to disregard a law of a State that would be controlling in

an action upon the same claim by the same parties in a State Court:

> "It is therefore immaterial whether statutes * * * are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us." (page 109)[4]

III. In the light of the Erie v. Tompkins decision, Section 3 of the Federal Arbitration Act is necessarily limited in its application to cases involving foreign or interstate commerce or where Federal jurisdiction is based on grounds other than diversity of citizenship.

1. The cases relied upon by the Circuit Court are not authority to the contrary.

In the principal case, the Circuit Court per Judge Frank relies on *Shanferoke Coal and Supply Corp.* v. *Westchester Service Corp.*, 70 F. 2d 297 (CCA 2, 1934), aff'd 293 U. S. 449, 79 L. Ed. 583 (1935), *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854 (CCA 4, 1944), *Murray Oil Products Co.* v. *Mitsui & Company*, 146 F. 2d 381 (CCA 2, 1944) and *Parry* v. *Bache*, 125 F. 2d 493 (CCA 5, 1942), for

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[4] See also *Macias* v. *Klein*, 203 F. 2d 205, 207 (CCA 3, 1953) and *Perkowitz* v. *Humphrey*, 130 F. Supp. 142, 145.

In *Macios* v. *Klein*, the Federal Circuit Court for the Third Circuit held that although the Supreme Court of Pennsylvania held the State Statute of Frauds to "have procedural rather than substantive effect" (citing cases). "It operates to deny enforcement in the Pennsylvania courts of all contracts wherever made which do not comply with its requirements and not merely to render void such nonconforming contracts as may be made in Pennsylvania. It is nonetheless a statute which under the doctrine of *Erie R. R. Co.* v. *Tompkins* . . . must be applied in a federal district court sitting in Pennsylvania in a case of diverse citizenship to deny enforcement of such a contract. For from the Erie standpoint it must be regarded as substantive since its application will significantly affect the result of the litigation (citing, among others, *Guaranty Trust Co.* v. *York* and *Angel* v. *Bullington*)." . .

the proposition that in a diversity case such as the case at bar a stay should be granted under Section 3 of the Federal Arbitration Act. Yet none of those cases involved the issue now before this court.

The *Shanferoke* case involved an interstate transaction for the sale and delivery of coal. In the Circuit Court a stay was ordered under the provisions of 9 USC Section 3, and Judge Learned Hand said in his opinion that the operation of Section 3 was not necessarily limited by the definitions in Section 2 of the Act. But note that that falls short of a definite statement that it is in fact of broader scope, and note further that Judge Hand ends his discussion of this question by saying that "It is not necessary, however, to decide the point here, because the contract involved commerce as defined in Section 1." (page 299).

The Supreme Court affirmed the *Shanferoke* case in 1935, three years before the decision in *Erie R. R. Co.* v. *Harry J. Tompkins* overruled *Swift* v. *Tyson (supra)* and established a wholly new philosophy as to the interplay of Federal and State law.[5]

Hence *Shanferoke* v. *Westchester* cannot be cited as authority that in diversity cases, under the Erie rule, the federal law as to arbitration should be applied to the exclusion of conflicting local state law, because it was based on a view of diversity jurisdiction which came to an end with *Erie R. R. Co.* v. *Tompkins*.[6]

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[5] "*Erie R. R. Co.* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process . . . Prior to *Erie R. R. Co.* v. *Tompkins* it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature and jurisdiction of the federal courts in diversity cases." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 107, 110, 89 L. Ed. pp. 2079, 2082, 2087.

[6] See discussion of the case of *Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177 (1912) by this court in *Angel* v. *Bullington*, 330 U. S. 183, 192, 91 L. Ed. 832, 838 (1947).

In *Parry* v. *Bache (supra)*, the court decided that

> "the agreement being clearly one 'evidencing a transaction involving commerce', we do not undertake to determine whether as ably argued, by appellees, the invoked section of the arbitration act (section 3 of Title 9, USC.) is broader than the preceding sections and, not limited as those are, to maritime transactions and those involved in commerce, extends to all issues 'referable to arbitration under an agreement in writing for such arbitration.'" 125 F. 2d p. 495

Thus the Fifth Circuit Court in that case specifically declined to decide the very question involved in this appeal.

Agostini Bros. Bldg. Corp. v. *United States*, 142 F. 2d 854, (CCA 4, 1944) involved an action brought by the United States in the Federal Court under the Miller Act on behalf of a sub-contractor against a contractor on the latter's bond to recover for labor and materials furnished in the construction of a government building. Hence that case did not fall within the class of cases to which the Erie Doctrine applies.[7] The court's sweeping language in that decision as to the wide scope of Section 3 of the Federal Arbitration Act is not justified by the issues there at bar.

Murray Oil Products v. *Mitsui and Company* had to do with a transaction in foreign commerce, so that again the court did not, in fact, face the issue of whether Section 3 could be applied to diversity cases.[8] Neither did the court

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[7] This court in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832 (1947), carefully distinguished diversity cases from those where "resort is had to a Federal Court *not on grounds of diversity of citizenship but because a Federal right is claimed* . . . ." (emphasis added) Page 192 and see quotation from *Erie R. R. Co.* v. *Tompkins (supra)* in footnote 3.

[8] Similarly practically all of the other appellate court decisions that have discussed the scope of Section 3 of the Act have involved interstate or foreign commerce or some ground for federal jurisdiction other than or in addition to diversity of citizenship.

(Footnote continued on next page)

have to choose between conflicting state and federal law. The case had been originally brought in a New York State court and then removed. Both the federal and New York statutes enforce arbitration agreements. If it were not for this fact, the failure of the court in the *Murray Oil* case to even mention the *Erie* decision would be a striking oversight.

2. Choice of the forum is a substantial right within the definition of Guaranty Trust Co. v. York.

The circuit court below relies upon a statement in the opinion in *Murray Oil Products Company* v. *Mitsui and Company (supra)*, to the effect that "arbitration is merely a form of trial, to be adopted in the action itself, in place

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TAFT-HARTLEY ACT (LABOR MANAGEMENT RELATIONS ACT):

Shirley-Herman Co. v. *International Hod Carriers*, 182 F. 2d 806 (CCA 2, 1950);

International Union United Furniture Workers v. *Colonial Hardwood Flooring Company*, 168 F. 2d 33 (CCA 4, 1948);

Tenney Engineering, Inc. v. *United Electrical Workers*, 207 F. 2d 450 (CCA 3, 1953);

FAIR LABOR STANDARDS ACT OF 1938:

Donahue v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (CCA 3, 1943);

Watkins v. *Hudson Coal Co.*, 151 F. 2d 311 (CCA 3, 1945), cert. den. 327 U. S. 777, 90 L. Ed. 1005 (1946);

INTERSTATE AND FOREIGN COMMERCE:

Amalgamated Association v. *Pennsylvania Greyhound Lines*, 192 F. 2d 310 (CCA 3, 1951);

MARITIME TRANSACTIONS—ADMIRALTY LAW:

Marine Transit Corp. v. *Dreyfus*, 284 U. S. 263, 76 L. Ed. 282 (1932);

Kulukundis Ship Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978 (CCA 2, 1942);

Pahlberg Petition, In Re, 131 F. 2d 968 (CCA 2, 1942);

The Gerald A. Fagan, 49 F. 2d 215 (CCA 2, 1931).

of a trial at common law—it is like a reference to a master, or an 'advisory trial'". (page 383)

This statement ignores the very issue before this court. It glosses over the real differences between the proceedings under an ordinary rule of reference on the one hand and an arbitration on the other. These are more than sufficient to produce a substantially different result within the meaning of *Guaranty Trust Co.* v. *York* (*supra*).

Rule 30 of the Commercial Arbitration Rules of the American Arbitration Association, which are set forth as controlling arbitration procedure under the contract of the parties in this case (R. 4), provides among other things as follows:

> ". . . The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."

In contrast, the Vermont Statute on Reference of Causes by the supreme or county court provides:

> ". . . Such referees shall be governed by the rules of law in the admission of evidence and determination of the issue and shall state in their report decisions made as to the admission or rejection of evidence, when the party against whom the decision is made so requests in writing."
>
> Vermont Statutes, Revision of 1947, Section 1936.

In the recent case of *Wilko* v. *Swan*, 346 U. S. 427, 98 L. Ed. 168 (1953), involving a situation quite analogous to that in the principal case, the respondent relied on *Murray Oil Products Company* v. *Mitsui and Company* (*supra*) for the very proposition here advanced by the Circuit Court, and this court in disposing of that argument stated that

> ". . . As their (the arbitrators') award may be made without explanation of their reasons and without a complete record of their proceedings, the arbi-

> trators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' . . . cannot be examined. Power to vacate an award is limited . . . In unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." (pages 436-437)

This court then cites (page 437) *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 94 L. Ed. 55, and states that in that case

> "*We said the right to select the 'forum' even after the creation of a liability is a 'substantial right'.*"[9] (emphasis added)

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[9] To grant a stay of the action in the Federal District Court until arbitration is had would result in forcing the appellant to arbitrate. We cite our own experience as a case in point. Here the respondent has commenced arbitration proceedings, and before we could perfect our petition to this court from the Circuit Court it attempted to proceed with arbitration before the American Arbitration Association in New York City. That award would have been an award enforceable in the Courts of New York State, regardless of the results here. (*Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 Law and Contemporary Problems, 580, page 604.)

Even now, an application of Section 3 to stay this action would compel our client to arbitrate this case just as effectively as an order under Section 4. Hence, it is unrealistic to deny that Section 3 is an enforcement provision, whatever technical distinctions can be made about "specific enforcement" as a word of art in the field of equity jurisprudence. We say that in effect Section 3 does enforce arbitration and that under the *Erie* Doctrine it must be limited in its application to cases involving interstate or foreign commerce or where some federal right is involved. The arguments to the contrary overlook what actually must happen when a stay is granted.

3. Section 3 of the Federal Arbitration Act does not apply in the field of Diversity Federal Jurisdiction.

Only one of the circuit courts has decided the specific issue before this court. Significantly, it is the only Circuit Court opinion involving Section 3 of the Federal Arbitration Act to mention *Erie* v. *Tompkins*. In *Tejas Development Company* v. *McGough Bros.*, 165 F. 2d 276, (CCA 5, 1947) the plaintiff, of Minnesota, brought suit against a Texas defendant in a Federal District Court in Texas to enforce the awards made in two separate arbitration proceedings arising out of alleged breaches of contracts for the construction of buildings and the grading and paving of streets in a Texas town.

Texas, as does Vermont, follows the common law under which: ". . . the general rule is well settled that either (party) can revoke the submission at any time before an award has been made (citing *C. J. Arbitration and Award*, Section 92 . . .). This is the very sort of agreement that the law says cannot be enforced so long as it is executory . . . the law does not favor unwilling arbitrations, and therefore, it permits either party to make timely withdrawal from such contracts, and even from an actual submission prior to an award". *Tejas* v. *McGough Bros. (supra)* at pages 279, 280.

The court, while it upheld in part one of the awards in the dispute since both parties had voluntarily submitted the dispute to arbitration and neither had withdrawn prior to that award, nevertheless states that "The invalidity of the second award is clear. Appellant so soon as arbitration was proposed positively refused to appoint an arbitrator or to make a submission. It did not appear at any hearing or do anything that could be a ratification or waiver. The arbitrators appointed by others and proceeding ex parte could not make a binding award." (page 281)[10]

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[10] The Sixth Circuit appears to agree with the Fifth Circuit that State law controls in diversity cases. *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876 (CCA 6, 1944). That case was originally brought

(Footnote continued on next page)

The court there held that such contracts were governed by Texas law as to enforceability of arbitration agreements and not by the Federal Arbitration Act stating, at pages 278-279:

> "But it is argued that the enforcement sections which follow (Section 2 of the Federal Arbitration Act) are in broader terms and cover all controversies involving arbitrations of which a federal court may obtain jurisdiction, *though only because of diversity of citizenship, as here.* This may be true to the extent that the summary procedures by motion can be resorted to as a federal procedural matter; but that does not help here, for the question is not as to the method of enforcement of a valid award, but of the validity of the awards and the binding effect of the agreement to arbitrate, both of which are matters of State substantive law, since contract and arbitrament arose under State law. *The awards can become no better by going into a federal court to enforce them than they would be in State Courts, Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487 and cases following it." (emphasis added).

See also *Franke* v. *Wiltschek*, 209 F. 2d 493 (CCA 2, 1953); *Clain* v. *City of Burlington*, 202 F. 2d 532 (CCA 2, 1952); *Edwards* v. *McCullough*, 114 F. Supp. 767 (W. D. Ky.); and *Macias* v. *Klein*, 203 F. 2d 205 (CCA 3, 1953).

Each of those was a diversity case, and although they did not involve the enforcement of arbitration contracts, each supports the general principle laid down by Mr. Justice

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in a Kentucky State court and later removed to the United States District Court. The Circuit Court, on appeal, ruled (page 881) that arbitration was a matter of remedy and that the law which governs remedies is the law of the forum. It then proceeded to declare Kentucky law the law of the forum and refused to grant a stay under Section 3 of the Federal Arbitration Act on the ground that: "The Rule prevails in Kentucky that parties may not by contract deprive themselves of the right to resort to courts for the settlement of their controversies. It is our duty to expound, not make the law of the state." (page 881).

Douglas in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538, 93 L. Ed. 1524, 1527 (1949), namely that

> "The York case (meaning *Guaranty Trust Co.* v. *York*) was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case."

Conclusion

All of the cases which have favored a broader application for Section 3 of the Arbitration Act ultimately trace their authority to Judge Hand's dictum in *Shanferoke* v. *Westchester* (*supra*). *Shanferoke* was decided three years before *Erie* v. *Tompkins* overruled the venerable case of *Swift* v. *Tyson*. With the exception of *Tejas* v. *McGough* none of the courts have been confronted with the necessity of choosing between conflicting Federal and State rules on arbitration in a case where Federal jurisdiction was based solely on grounds of diversity of citizenship. It is petitioner's contention that whether or not *Shanferoke* v. *Westchester* was good law when it was decided, in the light of the decision in the *Erie* case the Federal Arbitration Act is necessarily limited to cases involving commerce or where jurisdiction is based on some ground other than or in addition to diversity of citizenship. Where, as in *Murray Oil Products*, there is no conflict between Federal and State law as to arbitration, this question does not arise, because the result is the same whichever law is applied.

The decision below should, therefore, be reversed.

Respectfully submitted,

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